APR 24 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 982

J. M. COHAN,

Petitioner,

vs.

CHARLES SAMUEL ELDER and MARY ETHEL ELDER, his wife,

Respondents.

Petition For Writ of Certiorari to the United States Circuit Court of Appeals For the Ninth Circuit and Brief in Support Thereof.

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I.

A farmer-debtor who secured the approval of a majority in number and amount of his creditors to his composition and/or extension plan and who had it confirmed by the District Court cannot claim to be "aggrieved" thereafter, and, in that manner, secure a further three-year extension; one cannot be "aggrieved" by his own acts; subsection (1) of section 75 provides the full relief intended by Congress for a farmer-debtor upon confirmation of a plan..... 20

II.

A farmer-debtor who has secured a confirmation of a composition and/or extension plan and is "aggrieved" by it must amend under subdivision (s) within a reasonable time; an amendment filed 33 months after date and but 3 months before date of expiration of plan was not filed within a reasonable time; one who accepts benefits of composition and/or extension plan for 33 months and who repeatedly during that 33-month period proclaimed that plan as confirmed, and, as modified, provided financial rehabilitation is estopped from being "aggrieved"..... 26

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, J. M. Cohan, respectfully shows:

I.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed March 26, 1941 [R. 98-103], and is not yet reported in the Federal Reporter. A prior opinion on a former appeal in the same case, but on a different question, was rendered on June 7,

1940, and is reported in 112 Federal (2d) 967. Latter is not concerned directly in this petition for Writ of Certiorari.

II.

Jurisdiction.

The final judgment of the Court below was filed on March 26, 1941 [R. 98-103], and this petition is filed within three months thereafter.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stats. 938; 28 U. S. C. Sec. 347).

III.

Statement of Facts.

(Throughout the following statement of facts; Petition and Brief in support of this Petition, your petitioner is designated as creditor or secured creditor and respondents are designated as debtors.)

In 1931 this creditor sold to these debtors a twenty-acre citrus grove, seventeen acres planted to lemons and three acres planted to Valencia oranges, located in Los Angeles County, State of California. There was a cash payment of $5000 and a transfer of a mountain cabin at the allowed value of $2000.00, to apply on the purchase price. Debtors assumed a deed of trust on said property in the sum of $15,000.00 and the seller took from the buyers (debtors) an amortized second deed of trust on said property in the sum of $20,500.00, interest at the rate of 7%, together with an unsecured note for $10,000.00. The note for $10,000.00 was finally paid by the debtors after this creditor was forced to retain an attorney for

said purpose. Subsequently, the note for $20,500.00, secured by the deed of trust, changed hands several times, but is now back with the original holder. Therefore, all proceedings relative to the $20,500.00 deed of trust are given in the name of this creditor for the purpose of clarity.

In 1933 and 1934 these debtors were unable to meet the obligations and conditions of the first and second deeds of trust on the grove and were delinquent in their taxes for same. The holder of the first deed of trust intended to execute on the deed of trust held by him because of the defaults of these debtors in 1933 and 1934. Thereupon, on February 1, 1934, this creditor arranged a tri-party agreement between the holders of the two deeds of trust and the debtors whereby the holder of the first deed of trust agreed in writing not to foreclose upon the debtors upon the postponement of certain rights of this creditor. During the period from February 1, 1934, to September 27, 1938, there was not one cent of interest paid to this creditor upon his sizable investment. From 1934 to 1937 there was nothing paid on principal, either. The first deed of trust was paid off late in 1936. During the period of January, 1937, to September, 1937, this creditor received some $600 on principal in accordance with a recorded crop sharing agreement with the debtors that was abrogated by the confirmed plan.

In January, 1937, debtors were unable to pay anything on our deed of trust and late that month a freeze destroyed most of the crop on the grove and injured many of the trees. It was evident that debtors would be unable to meet any of their obligations under said deed of trust, as their only source of income was that received from the aforementioned grove, commonly described throughout

these proceedings as the "lemon grove" and another twenty (20) acre grove, planted to oranges, located in Los Angeles County also, and commonly described in these proceedings as the "orange grove." On the orange grove there were several deeds of trust securing large indebtedness', too. The trustee of our deed of trust, First National Bank of Pomona, was given notice in February, 1937, of the recordation of default and instructed to proceed with a sale of the security in accord with the provisions of the law of California thereon. This creditor has a lien on but one of the two groves standing in names of debtors. Our lien is on the so-called "lemon grove" only.

On May 11, 1937, 88 days after notice of default, debtors filed their petition, No. Pomo-C-181, in the Superior Court of the State of California in and for the County of Los Angeles, through their attorney, Allan J. Carter, Esq., seeking relief under the California Moratorium Act. The matter was subsequently dismissed upon motion of this creditor by the Honorable Frank Swain, Judge. However, before granting the dismissal the Court had heard all of the evidence proffered by petitioners.

On August 14, 1939, the trustee of said deed of trust was to hold a sale of said property. On August 13, 1939, debtors filed their petitions in the United States District Court, Southern District of California, seeking relief under the provisions of Section 75 of the National Bankruptcy Act, thus prohibiting a sale by the trustee. Hearings were subsequently had before Hon. Oregon Smith, Conciliation Commissioner, at which time debtors proffered their original proposal, which was refused by this creditor. When the original proposal was refused by this creditor, his attorneys journeyed from Los Angeles to Pomona to consult with debtors' attorneys in an effort to secure a fair proposal. Debtors then filed their amended proposal, which

was also refused by this creditor. Thereupon, the Conciliation Commissioner, Hon. Oregon Smith, instructed debtors to proceed under subdivision (s) of Section 75. However, several days later, a new hearing was ordered by a Supervising Conciliation Commissioner, and the new hearing was held by Hon. C. P. Von Herzen, at which time the second amended proposal was presented [R. 13] over the objections of this creditor. This second amended proposal was confirmed by the Honorable H. A. Hollzer, District Judge [R. 24], over the strenuous objections of this creditor. Under the terms of said proposal the District Court retained jurisdiction for the purpose of supervision and control for three years [R. 13].

Under the terms of the confirmed proposal, all taxes, living expenses of debtors, operation expenses of properties, etc., were to be paid before any money was paid to a creditor. Interest was to be paid this creditor at the reduced rate of 6%, payable annually the first year, semi-annually thereafter, and $1647.00 was to be paid on principal amount on March 27, 1939; $2000.00 on September 27, 1939; $2500.00 on March 27, 1940, with balance on September 27, 1940 [R. 14]. The other debts and their method of payment are set forth in the plan [R. 13-17].

On September 27, 1938, this creditor received one year's interest at the reduced rate. On March 27, 1939, debtors were unable to pay principal or interest due under plan. There was filed by this creditor a motion to dissolve the restraining orders prohibiting a sale under the deed of trust held by him on March 31, 1939, and a motion to dismiss the proceedings and to vacate the order of confirmation was also filed [R. 31]. On April 6, 1939, debtors filed a petition to postpone the payment of principal sum of $1647.00 and interest, due under the plan, for 90 days [R. 25] and on same day filed their petition

to reduce rate of interest payable to all creditors to 3½%. The matters were heard by the District Court on April 10, 1939, and this creditor showed that it was impossible for debtors to make such payment in 90 days. Debtors then asked leave of Court to amend their petition asking for extension of the payment of the principal sum of $1647.00 and the Court granted leave to amend the petition which sought extension for 90 days for the payment of the principal sum of $1647.00 and interest. The debtors filed their amended petition on April 13, 1939, and said amended petition not only sought to extend the payment of the $1647.00 amount, but incorporated the principal payment of $2000.00 which was due in September, 1939 [R. 35]. In the hearing of April 10, 1939, certain questions were referred to the Conciliation Commissioner for report and the report was returned to the Court on May 9, 1939. The report disclosed that the taxes on the property on which we held the deed of trust were unpaid and said taxes were still unpaid on July 15, 1940; living expenses of debtors were unpaid; Conciliation Commissioner's fees of administration unpaid; current operation expenses of over $2400.00 unpaid, and said report did not include the operation figure of $274.93. The report further showed that most of the principal and interest items due under the plan were unpaid and that debtors were behind over $8500.00 on their plan, as well as incurring additional thousands of dollars of new debts.

The decree granting petition for reduction of interest payable to all creditors, secured and unsecured, to 3½% and granting the amended petition for postponement of the two principal payments due this creditor and denying the two motions of this creditor was signed and filed on September 28, 1939 [R. 45].

From said decree of September 28, 1939, this creditor filed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, same being No. 9377 and the decree of the District Court was affirmed in the decision rendered June 7, 1940, and reported in 112 Fed. (2d) 967.

The foregoing constitutes a statement of the factual situation up to and preceding the matters immediately pertinent to the questions decided in the decision which is the basis of this petition.

Under the confirmed plan, as amended, and as approved on appeal, these debtors were required to pay this creditor $2500.00 on March 27, 1930, together with interest at the reduced rate [R. 13 and R. 45]. When debtors and Conciliation Commissioner refused to perform in accord with the plan, as amended, this creditor filed the petition for leave to sell [R. 66] and motion to vacate restraining orders [R. 48]. These were filed on July 2, 1940, and were set for hearing on July 8, 1940. Three days later debtors filed their amended petitions for leave to go under subdivision (s) [R. 52-56], together with recommendations of the Conciliation Commissioner. The minute order of adjudication was stamped with the name of the Honorable Geo. Cosgrave, Judge, on July 5,1940 [R. 60]. It is the practice in the aforesaid District Court to present said amended petitions for filing and the clerk thereupon affixes the stamp of the judge thereon. No creditor was apprised of the filing of said amended petitions by either the debtors or the Conciliation Commissioner, notwithstanding the fact that this creditor had served upon them copies of the aforesaid motions.

Thereafter this creditor filed the motion to dismiss [R. 69] on July 10, 1940, and the motion to set aside the

orders permitting debtors to go under subdivision (s) [R. 70] and secured a temporary restraining order and order to show cause on July 11, 1940. Said latter was to prevent the exercise of the rights of subdivision (s) until further order of Court. These last motions were set for July 15, 1940, the previous motions having been continued until said date. On July 15, 1940, this creditor presented argument on said motions and debtors replied. The Conciliation Commissioner did not participate in the argument, albeit in court [R. 76]. Nowhere or no time were any of the facts alleged in the affidavits in support of this creditors' various motions, etc., denied by debtors or Conciliation Commissioner either by counter-affidavit or otherwise. At the conclusion of the hearing this creditor was permitted [R. 77] to present the testimony of two appraisers out of order for the purpose of saving this creditor additional appearance fees, that being their second day in court waiting to testify. These appraisers were O. A. Nickerson and Charles A. Trowbridge and each testified that the value of the lemon grove, security for our deed of trust, was under $20,000.00, same being under our lien amount. All of the record presented in the District Court on the matter is now before this Court. The District Court ordered the matter submitted on briefs and on August 6, 1940, made its order denying the motion of this creditor to set aside the orders permitting debtors to go under subdivision (s) and to strike same from the files, together with the recommendations of the Conciliation Commissioner [R. 78].

From the order denying this creditor's motion, appeal was taken to the United States Circuit Court of Appeals (9th Circuit) and said Court affirmed the order of the District Court [R. 104]. Thereupon this petition.

III (A).

Summarization of the Facts.

1. Feb., 1931, creditor sells 20 acre citrus grove to debtors, taking back an amortized deed of trust secured by said grove [R. 4];

2. Feb., 1937, creditor files declaration of default under deed of trust, not having received a single penny on interest or principal during period 1934-1937 [R. 5];

3. May, 1937, debtors file for relief under California Moratorium Act [R. 5];

4. July, 1937, debtors denied relief under California Moratorium Act; petition dismissed by Superior Court of California [R. 5];

5. July 13, 1937, debtors filed under Section 75 of Bankruptcy Act, one day before date of sale under deed of trust [R. 18];

6. Sept. 27, 1937, debtors secure approval of their second amended composition and/or extension plan under subs. (a) to (r) of Section 75; confirmed by District Court [R. 18];

7. Debtors fail to pay taxes, operation expenses of grove, interest and principal sums due under plan during period of Sept., 1937-March, 1939 [R. 31];

8. March, 1939, creditor moves to dismiss and petitions for leave to sell because of facts in No. 7, hereof [R. 31];

9. April, 1939, debtors petition for modification of plan [R. 29, 35];

10. Sept., 1939, petition seeking modification of confirmed plan granted and creditor's motions denied [R. 45];

11. Oct., 1939, creditor appeals from No. 10 to Circuit Court [R. 9];

12. June, 1940, Circuit Court (9th) affirms decree of modification;

13. July 1, 1940, creditor petitions for leave to sell, etc. [R. 48];

14. July 5, 1940, debtors file amendment under (s) when plan was in operation for approximately 33 months and had but three months more to continue [R. 56]; taxes, operation expenses, interest and principal payments unpaid;

15. July 11, 1940, creditor files motion to vacate adjudication [R. 70];

16. August 6, 1940, District Court denies motion to vacate order of adjudication [R. 78];

17. Sept., 1940, creditor appeals to Circuit Court (9th) from order denying motion to vacate adjudication [R. 79];

18. March 26, 1941, Circuit Court (9th) affirms District Court Order [R. 98].

IV.

Questions Presented.

1. Has a debtor under Section 75, subs. (a) to (r), of the Bankruptcy Act, the right to amend under sub. (s), thereof, after securing the consent of a majority in number and amount of creditors and after District Court has confirmed plan?

2. Has a debtor under Section 75, subs. (a) to (r), of the Bankruptcy Act the right to amend under sub. (s), thereof, a confirmed plan thirty-three months after presentation, and, particularly, when said confirmed plan was for a period of thirty-six months?

3. Does not sub. (l) of Section 75 of the Bankruptcy Act provide the full relief intended by Congress for a debtor that has secured confirmation by the District Court of his own plan which he had approved by a majority in number and amount of his creditors?

4. (a) Is it not the duty of a debtor under Section 75, subs. (a) to (r), of the Bankruptcy Act, to file leave to amend under sub. (s), assuming for the purpose of this question the validity of No. 1, hereof, within a reasonable time after confirmation of a composition and/or extension plan?

4. (b) Has a District Court the right to allow an amendment under sub. (s) of Section 75 of a composition and extension plan that had but three months to live, it being thirty-three months after presentation of a thirty-six month plan?

5. Can a debtor under Section 75 be aggrieved by his own act of securing confirmation of his plan and operating under it for a period of thirty-three months? And, particularly, can said debtor claim to be aggrieved after lapse of thirty-three months when during said period he accepted benefits thereunder and repeatedly proclaimed that confirmed plan, and, as amended, provided rehabilitation?

V.

Reasons Why the Writ Should Be Granted.

I.

In holding that a debtor under Section 75, subs. (a) to (r), who had his own composition and extension plan confirmed, and later modified at his own request, may amend under the provisions of sub. (s) of said statute, the Court below has decided an important question of Federal law and an important question of jurisdiction of a District Court which has not yet been, but which should be settled by this Court.

II.

In holding that a debtor under Section 75, subs. (a) to (r), who had his own composition and extension plan confirmed, and later modified at his own request, may amend under the provisions of sub. (s) of said statute, thirty-three months after presentation and when the confirmed plan has but a three month period of life remaining, the Court below has decided an important question of Federal law and an important question of jurisdiction of a District Court which has not yet been decided, but which should be settled by this Court.

III.

In holding that a debtor under Section 75, subs. (a) to (r), may amend at any time to secure a further three-year extension under sub. (s) and need not do so within a reasonable time after confirmation of his plan, the Court below has decided an important question of Federal law and Federal procedure which has not yet been decided, but which should be settled by this Court, particularly, since it is the established rule that when a statute does not specify a time limit in which an act permitted therein may be done, a reasonable time is presumed to have been intended.

IV.

In holding that a debtor has the right to amend under sub. (s) at any time, notwithstanding that such amendment comes when his plan has but three months to live under subs. (a) to (r), it appears that the Court below has, we respectfully submit, approved of a procedure which could ultimately divest Courts of authority for the reason that the Act, subs. (a) to (r), requires confirmation by the District Court and requires action by the District Court for modification of the approved plan (sub. (l)) and all this could be cast aside by a debtor-litigant by a mere amendment on his part at any stage of the procedure and indirectly makes a travesty of the former proceedings and tends to destroy confidence in the integrity of legal procedure. This type of procedure, we respectfully submit, is foreign to law and justice.

V.

In holding that paragraph 3 of sub. (s) of Section 75, which does not refer to compositions or extensions, supersedes and overrides sub. 5 of 11 U.S.C.A., Section 32 (c), which prohibits a discharge where a composition plan has been confirmed within last six years, the Court below has decided an important question of Federal law which has not yet been decided, but which should be settled by this Court.

VI.

In holding that a debtor may amend under sub. (s) without giving notice, the Court below has approved of a procedure which is a denial of due process of law and which procedure has not yet been decided, but which should be settled by this Court.

VII.

Many of the compositions and/or extensions confirmed under the provisions of Section 75, subs. (a) to (r), are now expiring and this case presents a timely opportunity for this Court to indicate whether the debtors in such proceedings may amend just before expiration of their confirmed plan and secure a further three-year extension beyond that which they originally sought. This is the first case decided by a Circuit Court on this question and action taken now will avoid confusion and conflicting interpretations in the various Circuit Courts of Appeals. The Circuit Court of Appeals for the 7th Circuit on March 15, 1941, held that a debtor must amend under (s) within a

reasonable time after failing to secure a composition with creditors; said latter decision is in conflict with the decision which is the basis for this Petition in so far as the question of reasonable time is concerned. Therefore, this Court should resolve that conflict.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, directing that Court to certify and send to this Court for its review and determination, on a date certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 9663, J. M. Cohan, Appellant, vs. Charles Samuel Elder and Mary Ethel Elder, Appellees," and that the judgment of said Court therein be reversed by this Honorable Court and that your petitioner may have such other and further relief as to this Honorable Court may seem proper and just.

Dated: April 22, 1941.

BURNETT WOLFSON,
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